No. 15113

In the United States Court of Appeals for the Ninth Circuit

GOODYEAR FARMS, A CORPORATION; ADAMAN MUTUAL WATER COMPANY, A CORPORATION; B. W. MULLINS, JAMES H. SHARP, GEORGE W. BUSEY, CARLON H. HINTON AND VERNA HINTON, HIS WIFE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

GOODYEAR FARMS, A CORPORATION; ADAMAN MUTUAL WATER COMPANY, A CORPORATION; BILL W. MULLINS AND RALPH ASHBY AND GRACE ASHBY, HUSBAND AND WIFE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The jurisdiction of the district court was invoked under the Act of February 26, 1931, 46 Stat. 1421, 40

U. S. C. sec. 258a, and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257; the Act of August 18, 1890, 26 Stat. 315, 316, as amended by the Acts approved July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171, which acts authorize the acquisition of land for military purposes; the Act of August 12, 1935, 49 Stat. 610, 611; 10 U. S. C. sec. 1343a, b and c, which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947, 61 Stat. 495; the Act of July 14, 1952, 66 Stat. 606; which Act authorized acquisition of the land, and the Act of July 15, 1952, 66 Stat. 637, which Act appropriated funds for such purposes.

The order denying the motion for intervention was entered December 29, 1955, and notice of appeal therefrom was filed January 26, 1956 (R. 185). The order denying leave to file amended notice of appearance was filed March 5, 1956, and notice of appeal therefrom was filed March 28, 1956 (R. 222). The two appeals were consolidated. The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a court in a condemnation suit has jurisdiction to award compensation for the alleged taking of an avigation easement not described in the complaint.

2. Whether an irrigation water company may make a claim, in addition to the just compensation for the

unencumbered fee, for its right to make future assessments on condemned land.

3. Whether an irrigation water company has a compensable interest in land condemned by the United States for possible future assessments for the cost of the company's operation, maintenance, repair or improvement.

STATEMENT

This is a condemnation proceeding to condemn the fee simple title to approximately 239 acres (later enlarged to 253 acres) of land in Maricopa County, Arizona. The land was taken for the purpose of extending and improving the runways and facilities of Luke Air Force Base at Litchfield Park, Arizona. 233 acres of the land taken were within the Adaman Reclamation Project which before the taking contained approximately 2,831 acres. The Adaman Mutual Water Company (hereafter referred to as "Water Company"), an Arizona nonprofit corporation but not "a common carrier or public service corporation," is owned and operated by the landowners in the project to provide water for irrigating the land (R. 89–91).

The Water Company had the right while land in the Adaman Reclamation Project remained in private ownership to make pro rata assessments against that land for the operation, repair, improvement, or extension of the works owned by the Water Company. Such assessments and the subscription price of the Company stock (one share per acre) were to become due as made or called by the Board of Directors, and

amounts which thus became due were to be liens on the shares and the land.

The condemned land was divided into 10 tracts, numbered 111 to 120, inclusive, of which tracts 113 to 120, inclusive, were in the Adaman Reclamation Project. Full fee simple title to all tracts was vested in the United States upon filing of a declaration of taking and entry of judgment thereon on June 15, 1954. Subsequently the district court entered judgment fixing the just compensation for each tract except 119. During the course of the condemnation, it was determined that Well Site 18–C which was tract 119 (R. 13) was in fact part of tract 116 (R. 174, 175) thus making a separate judgment for tract 119 unnecessary. All the judgments were based upon stipulations with the owners. The stipulations for tracts 113 and 117 to 120, inclusive, contained provisions that the compensation was to be paid without prejudice to rights arising out of the petition for intervention (R. 140, 151, 161, 169). The stipulations provided for payment to Adaman Mutual Water Company of any assessments due on the tract and the subscription price on stock pertaining to the tract which was unpaid.

On July 24, 1954, a motion was made to intervene in the condemnation proceeding. The motion was made by the Adaman Mutual Water Company for itself and its stockholders asking compensation for its right to collect from the condemned lands the pro rata share of its future operating costs. The motion contained a distinct claim by various individuals as landowners, contract purchasers and lessees asking compensation for the

alleged use of an avigation easement over their land adjoining the airfield. Adaman Mutual Water Company and Goodyear Farms as owners and B. W. Mullins as a lessee were defendants in the condemnation proceeding as well as petitioners to intervene. B. W. Mullins was the lessee and Goodyear Farms the owner of tract 118 in the condemnation proceeding. It was a part of the tract which appellants designated as No. 19 on the map attached to their petition for intervention (R. 74). Appellants' Tract 19 is the only tract over which an avigation easement is claimed to have been taken which also included land (Tract 118) specified in the condemnation proceeding. The United States has never sought to condemn any interest in the lands over which the avigation easement is alleged to have been taken. The motion to intervene was denied by the district court on December 29, 1955. On February 20, 1956, the defendants Goodyear Farms, Adaman Mutual Water Company, B. W. Mullins and Ralph and Grace Ashby, petitioned the district court for leave to file an amended appearance in the condemnation proceeding. The grounds alleged in support of the petition were substantially the same as those alleged in the petition to intervene which the court had earlier denied. The petition for leave to file amended notice of appearance was denied by the court on March 5, 1956.

SUMMARY OF ARGUMENT

Both the appeals present the same two questions of law. If there can be no recovery in this condemnation proceeding for the use of an avigation easement

over land which is not condemned and if the Water Company has no claim in addition to the just compensation for the unencumbered fee of the lands in the Adaman Reclamation Project which were condemned, then the various petitioners have no grounds on which either to intervene or to file an amended appearance. The argument for each question will be presented separately.

1. *The avigation easement damages cannot be claimed in this condemnation proceeding.*—The district court had no jurisdiction to consider any claims relating to property not described in the complaint in condemnation. To consider such an extraneous matter would be to entertain a claim against the United States in a manner and in a court in which the United States has not consented to be sued. If the United States has used an avigation easement over lands owned by appellants they have a remedy under the Tucker Act. The appellants cannot pursue such remedies in this proceeding. The statutes under which this condemnation proceeding was brought do not authorize the petitioners to pursue remedies they may have under other statutes.

2. *The value of future assessments cannot be awarded in addition to the fee value.*—The United States is entitled to have just compensation for condemned property determined as an undivided whole and without reference to the various interests. The determination of just compensation has been made by the nine judgments of the district court from which no appeal was taken by the Water Company. The

principle of *res judicata* prevents the Water Company from raising any question which might have been raised in connection with the determination of just compensation. When the United States has paid the just compensation into court it has performed its full duty. The Water Company has no further recourse against the United States.

3. *In any event future assessments are not a compensable interest in property.*—Appellants assert the future assessments were a lien upon and a covenant running with the condemned land. Future assessments are not a lien upon land unless the statute or other authority creating the assessment right contemplated that future assessments should constitute a lien. An examination of the pertinent documents reveals there was no intent to make future assessments a lien.

There are no cases with a direct holding that covenants running with the land are compensable interests in condemnation proceedings. The Water Company's claim is really a claim for frustration of, at best, contract rights rather than an appropriation of an interest in land.

ARGUMENT

I

The avigation easement damages cannot be claimed in this condemnation proceeding

The appellants contend that lands belonging to them which are outside the airfield, and have never been condemned by the Government, have nevertheless

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been "taken" by the Government by reason of the flight of aircraft in taking off and landing at the airfield at such a low level as to constitute an interference with their use of the land. For present purposes, the Government takes no position on the merits of this claim. The sole contention of the Government is that if there has been such a "taking" the proper remedy of the appellants is a suit under the Tucker Act in the Court of Claims, 28 U. S. C. sec. 1491, or if the amount is under $10,000 in the United States District Court, 28 U. S. C. sec. 1346 (a).[1]

The district court had no jurisdiction in this condemnation case to consider claims as to parcels of land not embraced within the condemnation complaint. *Minnesota* v. *United States,* 305 U. S. 382 (1939); *United States* v. *2,648.31 Acres of Land, Etc.,* 218 F. 2d 518 (C. A. 4, 1955); *Oyster Shell Products Corp. Inc.* v. *United States,* 197 F. 2d 1022 (C. A. 5, 1952), certiorari denied, 344 U. S. 885, affirming *United States* v. *9 Acres of Land,* 100 F. Supp. 378 (E. D. La., 1951); *United States* v. *534.7 Acres of Land,* 157 F. 2d 828 (C. A. 5, 1946); *New York Telephone Co.* v. *United States,* 136 F. 2d 87 (C. A. 2, 1943); *Moody* v. *Wickard,* 136 F. 2d 801 (C. A. D. C., 1943), certiorari denied, 320 U. S. 775 (1943); *Karlson* v. *United States,* 82 F. 2d 330, 335–336 (C. A. 8, 1936). The identical contention which the appellants are making in this appeal was made by the appellant in

[1] There is, in fact, now pending in the Court of Claims a suit by appellants on this claim. *Adaman Mutual Water Co. et al.* v. *United States*, No. 139–56, filed March 28, 1956.

the *Oyster Shell* case. The Court there said (p. 1023):

> * * * The appellant's counterclaim insists that there should have been included in the petition for condemnation filed by the United States a description of all of the property belonging to appellant and described in its counterclaim, included and embraced in the actual taking in the construction of the Floodway; that practically all of appellant's properties have been dammed into the channel of the Floodway. The district court held that it had no jurisdiction to consider the counterclaim, because it sets up a claim against the United States in a manner and in a court in which the United States has not consented to be sued. We are in agreement with the views of the district court and do not consider it necessary to expand upon its opinion.

Settled principles compel this result. The United States cannot be sued without its consent. When it institutes a proceeding as plaintiff it does not consent to the assertion by way of counterclaim or otherwise of matters other than that which it submitted to the court. *United States* v. *Shaw,* 309 U. S. 495 (1940); *United States* v. *United States Fidelity and Guaranty Co.,* 309 U. S. 506 (1940); *United States* v. *Sherwood,* 312 U. S. 584 (1941). The condemnation complaint did not generally submit to the court all questions as to this particular project. It vested the court with jurisdiction only to award compensation for the taking of the specific parcels designated. Thus it is normal practice particularly in large projects to acquire

most of the lands by direct purchase, and to bring a series of proceedings to condemn various parcels for a particular project as they may be needed. Cf. *United States* v. *Miller,* 317 U. S. 369 (1943). Acceptance of appellants' present contention would produce the absurd result that in such cases the institution of the first condemnation proceeding would vest the court with jurisdiction to adjudicate the alleged taking of any lands for use with that project however remote physically. No such blanket consent to suit can be implied simply from institution of a proceeding to condemn designated lands.

Even though flights over private land may, in some circumstances, constitute a taking for which compensation may be had under the Tucker Act (*United States* v. *Causby,* 328 U. S. 256 (1946)), appellants cannot pursue such remedies in this proceeding. The statutes under which this condemnation proceeding was brought do not authorize the appellants to pursue causes of action against the United States they may have under other statutes. *United States* v. *Shingle,* 91 F. 2d 85 (C. A. 9, 1937); *United States* v. *John Ii Estate,* 91 F. 2d 93 (C. A. 9, 1937), certiorari denied in both cases, 302 U. S. 746 (1937).

The authorities cited by appellants do not sustain the proposition that a condemnee may inject into the case an issue of the alleged taking of lands not described in the complaint. They represent simply application of two principles of valuation. The first is the so-called "severance damage" rule requiring that in valuation regard be had to the fact that the parcel taken is part of a larger unit. Cf. *United States* v.

Wabasha-Nelson Bridge Co., 83 F. 2d 852 (C. A. 7, 1936); *United States* v. *Chicago, B. & Q. R. Co.,* 90 F. 2d 161 (C. A. 7, 1937). The second is the principle that easements or access roads and similar interests in land cannot be valued without reference to the property which they serve and the diminution in value which may be caused thereto by destruction of the easement.

Thus *United States* v. *11.48 Acres of Land,* 212 F. 2d 853 (C. A. 5, 1954), did not hold, as appellants claim (Br. 24), that damages to contiguous uncondemned lands could be recovered in the condemnation proceeding. The decision shows that compensation was paid not for the uplands, which were not in the condemnation proceeding, but for the riparian rights which were appurtenant to the uplands. The court expressly stated (p. 854) "The riparian rights of appellee, while accruing from his ownership of uplands, were easements or rights in the river and in the submerged lands condemned in this proceeding." Indeed, the language upon which appellant relies (Br. 24) says "this diminution in value of the uplands does not result from a taking of the uplands. * * *." The number of cases cited by appellants in which the owners of easements in condemned land were allowed to intervene or receive just compensation in condemnation proceedings are irrelevant for these reasons. *United States* v. *Sunset Cemetery Co.,* 132 F. 2d 163 (C. A. 7, 1942); *United States* v. *Certain Lands at Great Neck,* 49 F. Supp. 265 (E. D. N. Y., 1943); *Schiefelbein* v. *United States,* 124 F. 2d 945 (C. A. 8, 1942); *United States* v. *11.06 Acres of Land,* 89 F.

Supp. 852 (E. D. Mo., 1950). The appellee does not doubt the right of the owner of an easement in the land described in the complaint to just compensation, but the appellants' claims are not for any easements in the condemned property. Likewise it is perfectly clear that both the Declaration of Taking Act and Rule 71A contemplate that the specific lands to be considered are to be designated by the Government's complaint and not by either the condemnee or the court.

II

The value of future assessments cannot be awarded in addition to the fee value

As we noted earlier, the appellants present two distinct and unrelated claims in these appeals. In the claim we have just discussed, the avigation easement, all the appellants are claimants. In the claim we are now discussing, the future assessments, only the Water Company is the party in interest.

The Water Company contends it should be allowed to intervene in the condemnation proceedings for the purpose of asserting the right to compensation for the "taking" of the "perpetual and non-separable obligation to pay and maintain its[2] pro rata share of the cost of the construction, operation, and maintenance of the Company's facilities." (R. 50, 197.)

Appellee assumes, although appellant nowhere specifically says so, that the amount claimed by the Water Company is in addition to the amount of just compensation awarded for the taking of an unencum-

[2] The lands taken in this condemnation proceeding.

bered fee simple to all the lands condemned in this proceeding by the nine judgments previously entered. If the appellants seek no more than the redistribution of the amounts of the judgments determining just compensation, then appellee has no objection to the "intervention" of the Water Company for that purpose. The real parties in interest in such an event would be the other property owners and not the United States.

If, however, the appellants want to intervene for the purpose of asserting a further claim against the United States, then the petition to intervene was correctly denied by the district court. The Water Company has no claim above and beyond the amounts awarded as the fair market value of the property.

There are two broad issues which may be raised in a condemnation proceeding. The first is any objections which the defendants may have to the taking of the property, and appellants admit in their "amended notice of appearance" they have no objections or defenses to the taking (R. 191).

The second issue is just compensation. In determining this issue the United States is entitled to have the just compensation determined for the fee as an entirety, and all persons concerned must look to the amount thus determined for the value of their interests. "It is a fundamental principle, governing condemnation proceedings, where several interests are involved, such as estates for life, or in remainder, or leaseholds, or in reversion, in the property to be condemned, all should be combined in determining the value of the fee, after which the total value of the

fee can be subdivided in satisfaction of the values fixed upon the various interests involved." *Carlock* v. *United States,* 53 F. 2d 926, 927 (C. A. D. C., 1931); *State of Nebraska* v. *United States,* 164 F. 2d 866 (C. A. 8, 1947), certiorari denied, 334 U. S. 815 (1948); *United States* v. *Adamant Co.,* 197 F. 2d 1 (C. A. 9, 1952), certiorari denied, *sub nom. Bullen, et al.* v. *Scoville,* 344 U. S. 903.

The Water Company was made a defendant in the condemnation proceeding. However, it made no attempt to present evidence to the court as to the value of the property condemned by the Government or the value of its interest in that property. To do this it needed neither a petition to intervene, nor even a notice of appearance, much less an amended one. Rule 71A, paragraph (e), F. R. C. P. provides: "* * * at the trial of the issue of just compensation, whether or not he [defendant] has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award." The complaint lists the Water Company as an interested party in all those tracts for which it is now making this further claim, viz, tracts 113 to 120, inclusive (R. 5). The Water Company either stipulated the compensation for the taking of the unencumbered fee simple title (R. 168, 169) or did not choose to appear at all, in the determination of just compensation.[3] It did not appeal from the judg-

[3] The Water Company also signed a stipulation on tract 116 (R. 173–178). This was a disclaimer of any interest in the funds paid for the taking "of the unencumbered fee simple title" of the tract (R. 177).

ments awarding just compensation for the tracts. As appellants' brief states, "It has also been held that an award of compensation under a state statute, is conclusive as to every matter which could have been included therein whether or not it was in fact included. *South Carolina Public Service Authority* v. *11,754.8 Acres of Land,* 123 F. 2d 738." (C. A. 4, 1941) (Br. 33). The same is true in a federal proceeding. "The principle of res judicata will prevent subsequent litigation on questions of property interest which should have been raised in the condemnation suit." *United States* v. *Winn,* 83 F. Supp. 172 (W. D. S. Car., 1949); *Heiser* v. *Woodruff,* 327 U. S. 726, 735 (1946).

The stipulations on which these judgments were based provided the following amounts for the Water Company:

Tract 113	$429.16 plus interest (R. 160, 161)
Tract 114	$3,029.97 (R. 216)
Tract 115	"It is further stipulated and agreed by and between the above-named parties that the aforesaid sum shall be paid to John L. Roach and Bettie Joe Roach, husband and wife, and that from said sum there shall first be paid any and all liens, balance due on contract for purchase, taxes and encumbrances against said land * * *." (R. 125)
Tract 116	$6,281.13 (R. 180, 181)
Tract 117	$32.15 plus interest (R. 140)
Tract 118	$1,875.44 plus interest (R. 151)
Tract 120	$2,062.50 (R. 172)

Judgments awarding the just compensation for the unencumbered fee having been paid on all the tracts

condemned, the Water Company has no further recourse against the United States. "The condemnor, having paid into court just compensation for the land, has performed its full duty and is not concerned as to whom or when the court distributes; the condemnor is not even entitled to notice of the order of distribution." *United States* v. *Certain Lands in Town of Hempstead, Nassau County, N. Y.,* 129 F. 2d 918 (C. A. 2, 1942); *United States* v. *Dunnington,* 146 U. S. 338 (1892). This principle was specifically applied to claims as to future assessments in *People of Puerto Rico on Behalf of Isabela Irrigation Service* v. *United States,* 134 F. 2d 267 (C. A. 1, 1943), certiorari denied, 320 U. S. 753 (1943), where the Court stated:

> As a matter of fact, if the People of Puerto Rico has a lien its proper course of action is against the award and is not a claim for additional compensation against the United States. In such event the United States has no real interest in the disposition of this case for it will be required to pay no more into the registry of the court regardless of the validity of the alleged lien. The parties in interest would be the People of Puerto Rico and the landowners whose lands are situated in the irrigation system. 134 F. 2d 271.

III

In any event future assessments are not a compensable interest in property

Appellants point out that the Water Company "has lost the right to assess those lands, the title

to which has passed to the plaintiff" (Br. 14). Appellee agrees, and if the Water Company's claim is entitled to further attention, it must be based on that lost right. Appellants assert the right to make future assessments "constituted covenants running with and liens upon that land." (R. 50, 197.) The appellee believes that these future assessments did not constitute a lien or encumbrance on the condemned land, and even if the future assessments were covenants running with the land, the Water Company was not entitled to an award in depreciation of that given to the fee owners.

All assessments outstanding at the time the tracts were taken have been paid and likewise the pro rata share of capital improvements made before the land was condemned has been paid. This is reflected either in higher prices to the fee owners who paid the capital levies or in payments directly to the Water Company as set out above. The United States does not, of course, seek any share in the ownership of the Water Company or the use of its irrigation water, although under appellants' theory it would seem the United States would be entitled to both.

The leading and controlling authority is *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89 (1933), where the lands in local improvement districts were subjected by statute to assessment, and if necessary, reassessment to pay the bonds which had been sold for sewer and sidewalk improvements. Between the time of the original assessment and the time when reassessment became necessary, the United

States had condemned all of the lands in the improvement districts. The Supreme Court said:

> It is true these [re-assessments] could not thereafter be levied on property which had passed to the United States, but this does not mean that the Government appropriated the right to assess them *in futuro,* nor that it took the benefit which might accrue to bondholders consequent on such future levies. By purchase of the lands the United States at most frustrated action by the city to replenish the assessment fund to which alone the bondholder must look for payment of his bonds. But this was not a taking of the bondholder's property. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502. (290 U. S. 94, 95.)

This decision was followed in *People of Puerto Rico on Behalf of Isabela Irrigation Service* v. *United States,* 134 F. 2d 267 (C. A. 1, 1943), certiorari denied, 320 U. S. 753 (1943). There had been an agreement on compensation for the tangible items taken. The claim on appeal was based upon appellant's right to make future assessments upon the lands in the irrigation system, in addition to compensation for tangible items. The theory was either that such right was a franchise or that appellant had a lien on the lands in question for the assessments which it may levy in the future. The court rejected both arguments. "The right to levy special assessments in no way enhanced the value of the property condemned." 134 F. 2d 271. The court also held that under pertinent statutory provisions, the lien arose only after the annual assessments were made, and were, insofar as future assess-

ments were concerned, only potential liens which cannot be satisfied out of money paid into court under 40 U. S. C. sec. 258a.

Similarly in *United States* v. *Anderson Cottonwood Irr. Dist.,* 19 F. Supp. 740 (N. D. Cal., 1937), an irrigation district was formed under the laws of the State of California. Prior to the purchase of land in the irrigation district by the United States, the district had lawfully sold certain bonds. The lands were, by the terms of the California statute, subject to assessment each year during the term of the bonds for the purpose of raising money to retire the bonds and for other costs. The court held there was no intention on the part of the legislature to create an indirect lien for subsequent assessments upon the property within the district. The court cancelled liens created by assessment levied subsequent to purchase of the lands by the United States, and restrained the future levy of such assessments. *United States* v. *Aho,* 68 F. Supp. 358 (D. Ore., 1944), follows the legal reasoning of the three cases just discussed. The United States was condemning land in a drainage district organized pursuant to the laws of the State of Oregon. The cost of constructing and operating the drainage works was paid by assessment on the land in the district. The court interpreted the Oregon law as having "created an encumbrance on lands in the Drainage District which holds the land itself for future assessments." 68 F. Supp. 366. It was therefore held that:

> * * * the jury should be permitted to fix the value of the lands *benefited,* free from the burden of future assessments so that the taking will

> not be without just compensation. On the other hand, if the United States is accepting title subject to future assessments, that should be made clear. 68 F. Supp. 366. [Emphasis supplied.]

The rationale of the above cases is clear. Unless the statute or other authority creating the assessment right contemplated that future assessments should constitute a present lien, the future assessment is not an interest in the property for which compensation may be claimed in a condemnation proceeding. An examination of the pertinent documents in the present appeal shows that the assessments and calls for the subscription price of capital stock were liens only as made. The Articles of Incorporation provide, "the land * * * shall be subject to pro rata assessments * * *. The assessments *so made* shall be a lien upon said stock and upon the land * * *." (R. 93.) The Bylaws provide, "*The payments due* for the purchase of said stock and the calls and assessments thereon made by the Company *shall be a lien* * * *." (R. 105.) And just preceding the quoted language, "*Assessments and* the *subscription price* of said shares *shall become due from time to time, as they are called* or made and levied * * * and be a lien on said lands * * *." (R. 104.) [Emphasis supplied.] The same language appears in the contract for the sale of Water Company stock (R. 120). It is obvious that no lien for future assessments was intended.

Appellee has found no case, and appellants cite none, with a direct holding that covenants running

with condemned land are compensable interests in condemnation proceedings. Certainly, neither *United States* v. *Certain Lands at Great Neck, N. Y.*, 49 F. Supp. 265 (E. D. N. Y., 1943), nor *United States* v. *Florea,* 68 F. Supp. 367 (D. Ore., 1945), both of which discuss covenants running with the land, are direct authority. In the *Great Neck* case, the petitioners were asking to intervene on three grounds, one of which was that petitioners owned an easement and another was that they enjoyed the benefit of a covenant which ran, the burden of which was on condemned land. The court decided there was a right to intervene based on the ownership of the easement. Then, it said:

> Since the petition to intervene must be granted, perhaps nothing need be said with reference to the two remaining grounds upon which intervenors rely. Probably it would not be thought that the order to be entered hereon should in any case prescribe a limitation upon the proof which the intervenors may offer, but again to preclude controversy on the subject it may be appropriate to say as clearly as possible that no such limitation is hereby intended. 49 F. Supp. 267.

The court was not ruling on the validity of the claim, it was merely preserving to the intervenors the right to make it.

Again, in the *Florea* case, involving lands in a drainage district, the court discusses covenants running with the land, but clearly states "Of course it cannot be contended that in this situation there are any covenants * * *". 68 F. Supp. 374. The answer

which the court reaches can more readily be explained on the existence of a drainage easement over the condemned lands, and the obligations placed upon the land by statute which in the similar case of *United States* v. *Aho,* were held to be liens. In any event, the court found: " * * * a vast gulf, both practically and theoretically, between irrigation and drainage-diking. Irrigation water can be withheld so that no use can be made of the land, unless there is a payment of assessments. Drainage-diking benefits cannot be withheld without substantial and irreparable injury to the community. The benefits are thus irrevocable to the land itself. By no possibility can it be held that they do not touch and concern both the benefited and the burdened land. In irrigation, when the easement for carriage is destroyed or the real property right to have the water is done away with by abandonment, failure to make beneficial use, or waiver, there is neither benefit nor burden to touch and concern the land." 68 F. Supp. 371.

Basically the Water Company is a business enterprise selling water, even though it is mutual and nonprofit. Why should it be compensated for, in effect, the loss of its customers? Other business enterprises are not. *Kelletville Gas Co.* v. *United States,* 56 F. Supp. 919 (W. D. Penna., 1944); *Deepe* v. *United States,* 103 Colo. 294, 86 P. 2d 242 (1938).

The fact that there are no lands which can be added to the project to take the place of the condemned lands is immaterial in determining the value of the Water Company's interest in the condemned lands.

This argument is similar to the one that the Government must pay for the going concern value of a business when it condemns a business premises if the owner cannot find a place to relocate. "When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. See *Sawyer* v. *Commonwealth,* 182 Mass. 245, 65 N. E. 52, per Holmes, C. J. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. *Mitchell* v. *United States*, 267 U. S. 341." *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 12 (1949).

The matters discussed in this point are not, of course, of direct concern to the United States, as is stated in Point II. They are outlined here to give the court a complete view of potential problems presented by this appeal.

CONCLUSION

For the foregoing reasons it is submitted that the orders of the district court should be affirmed.

Respectfully,

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